

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

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COMPLETE TITLE OF CASE:

STATE OF MISSOURI , EX REL. TIVOL PLAZA, INC.,

Appellant

v.

MISSOURI COMMISSION ON HUMAN RIGHTS, ET AL.

Respondents

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DOCKET NUMBER WD78477

DATE: April 12, 2016

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Appeal From:

Circuit Court of Cole County, MO  
The Honorable Patricia S. Joyce, Judge

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Appellate Judges:

Division En banc:  
Joseph M. Ellis, Senior Judge Presiding, Alok Ahuja, Chief Judge, Victor C. Howard, Thomas H. Newton, Lisa White Hardwick, James Edward Welsh, Mark D. Pfeiffer, Karen King Mitchell, Cynthia L. Martin, Gary D. Witt, and Anthony Rex Gabbert, Judges

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**MISSOURI APPELLATE COURT OPINION SUMMARY**  
**MISSOURI COURT OF APPEALS, WESTERN DISTRICT**

**STATE OF MISSOURI , EX REL. TIVOL PLAZA, INC., Appellant, v.  
MISSOURI COMMISSION ON HUMAN RIGHTS, ET AL., Respondents**

**WD78477**

**Cole County**

Before En banc Division Judges: Joseph Ellis, Sr. J. Presiding, Alok Ahuja, C.J., Victor Howard, Thomas Newton, Lisa White Hardwick, James Welsh, Mark Pfeiffer, Karen King Mitchell, Cynthia Martin, Gary Witt, and Anthony Rex Gabbert, JJ.

**En banc Majority Opinion by Judge James Edward Welsh:**

Tivol Plaza, Inc. appeals the circuit court's dismissal of its petition for preliminary and permanent writ of mandamus against the Missouri Commission on Human Rights. Tivol asserts three points on appeal: (1) the circuit court erred in dismissing its petition for preliminary and permanent writ of mandamus because the Commission had a ministerial duty to determine its jurisdiction to issue the notice of right to sue and to dismiss any untimely claims; (2) the circuit court erred in dismissing its petition for preliminary and permanent writ of mandamus because mandamus was appropriate under section 213.085.2, RSMo 2000, section 536.150, RSMo 2000, and the Missouri Supreme Court's decision in *Farrow v. St. Francis Medical Center*, 407 S.W.3d 579 (Mo. banc 2013); and (3) the circuit court erred in finding that Tivol had preserved its right to raise the untimeliness issue in a subsequent civil action because *Farrow* mandates that the proper procedure for challenging the Commission's issuance of a notice of right to sue on untimely claims is by seeking judicial review of the Commission's administrative action.

**Appeal Dismissed.**

**En Banc Majority holds:**

The Supreme Court of Missouri has held that the issuance of a summons by the circuit court instead of a preliminary order in mandamus is not authorized by Rule 94. Although the Missouri Supreme Court has exercised its discretion to hear an appeal on the merits where a summons, rather than a preliminary order, was issued by the circuit court, the Supreme Court has made clear that it was "not required to exercise its discretion in like manner in the future." Thus, although we have the discretion to hear appeals on the merits in cases in which the circuit court issues a summons rather than a preliminary order, as an intermediate appellate court charged with the duty to enforce the Supreme Court Rules, we do not believe it is our place to continually excuse compliance with Rule 94.04, especially since the Missouri Supreme Court, over three years ago, put courts, litigants, and counsel on notice that the practice of issuing a summons in lieu of a preliminary writ is not authorized by Rule 94. When properly adopted, the rules of court are binding on courts, litigants, and counsel, and it is the court's duty to enforce them. We, therefore, decline to exercise our discretion to hear Tivol's appeal on the merits. Because the circuit court denied Tivol's petition for writ of mandamus without issuing a preliminary order, Tivol's proper course was to file its writ in a higher court.

### **Dissenting Opinion by Chief Judge Alok Ahuja:**

The author dissents in a separate opinion. In his view, a mandamus petition has a right to appeal whenever a trial court denies a mandamus petition on the merits, even if the trial court violated Rule 94 by failing to issue a preliminary order requiring the respondent to answer. On the merits, the author agrees with Judge Newton's dissenting opinion that Tivol had a right to judicial review of the timeliness of the employee's administrative charge of discrimination.

### **Dissenting Opinion by Judge Thomas H. Newton:**

The author would hold that the Court should reach and decide the issues raised by this appeal, exercising its discretion to do so under *U.S. Department of Veterans Affairs v. Boresi*, 396 S.W.3d 356 (Mo. banc 2013), *Powell v. Department of Corrections*, 463 S.W.3d 838 (Mo. App. W.D. 2015), and *In re Matter of R.M.A.*, 477 S.W.3d 185 (Mo. App. W.D. 2015), despite procedural irregularities stemming from a failure to comply with Rule 94's requirements for writs of mandamus. The issues on appeal are similar to those raised in dozens of pending disputes, and we do a disservice to employment-discrimination litigants and the Missouri Human Rights Commission by not giving them urgently needed guidance.

That guidance is called for due to possible misdirection arising from dicta in *Farrow v. Saint Francis Medical Center*, 407 S.W.3d 579, 590 (Mo. banc 2013). The *Farrow* opinion suggests that a writ of mandamus must be sought to review, after the Commission issues a right-to-sue letter, whether the discrimination claim giving rise to the letter was timely filed before the Commission and thus whether it had the authority to issue the letter, without which an employee cannot file a civil action against her employer.

Unnecessary to *Farrow*'s essential holdings was its discussion of how judicial review of the Commission's authority to issue a right-to-sue letter should be pursued after the letter issues. The Missouri Supreme Court instructed an aggrieved employer to file for relief under section 536.150 and, in a discussion not responsive to the issues, cited cases legally and materially distinct from *Farrow* because they involved different procedural circumstances. *Farrow* suggests that these cases—*State ex rel. Martin-Erb v. Missouri Commission on Human Rights*, 77 S.W.3d 600 (Mo. banc 2013), and *Public School Retirement System of the School District of Kansas City v. Missouri Commission on Human Rights*, 188 S.W.3d 35 (Mo. App. W.D. 2006)—allow a party to file a writ of mandamus when the Commission's issuance of a right-to-sue letter violated the Commission's prescribed procedures and applicable law.

The author explains the limits of those cases in the context in which they arose and thus did not apply to *Farrow* or here. By providing background on the Commission's authority under Chapter 213 of the Missouri Revised Statutes and describing under what circumstances and how any party aggrieved by a Commission determination may seek review of that determination, the author shows how *Martin-Erb* and *Public School Retirement System* are limited in their reach.

In this case, the Commission issued a right-to-sue letter at the expiration of its statutorily prescribed administrative-processing period, which recognizes that a discrimination investigation may not be complete within 180 days and gives an employee the right to end the Commission's authority to complete its investigation beyond that period by requesting a right-to-sue letter. The author would hold that a writ of mandamus is not available to compel the Commission to do anything after a right-to-sue letter issues, because, after that point, the Legislature has directed

that the Commission take no further action in the matter. An aggrieved employer may not seek withdrawal of a right-to-sue letter by means of a writ in mandamus.

Tivol sought such relief to have the Commission determine whether Norton's claims were timely filed before the Commission, but the agency has no authority to take any action after a right-to-sue letter issues. Still, an employer has the right to a determination of whether the Commission issued a lawful right-to-sue letter before it is required to defend itself in the succeeding discrimination lawsuit. Thus, the author believes that it is for the court to determine, during a hearing at which it takes evidence under subsection 536.150.1, whether the right-to-sue letter was properly issued, i.e., whether the employee timely filed her claim with the Commission.

While the case could be dismissed so that Tivol can refile its subsection 536.150.1 judicial review petition to seek a *de novo*, or original, hearing to determine if the Commission had the authority to entertain the employee's complaint based on a challenge to its timeliness, the author would dispatch with form over substance, reverse the trial court's dismissal of the petition for writ of mandamus, and remand the case with instructions permitting Tivol to amend its petition to seek an evidentiary hearing before the court.

Opinion by James Edward Welsh, Judge  
Dissent by Alok Ahuja, Chief Judge  
Dissent by Thomas H. Newton, Judge

April 12, 2016  
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